



---

# Supreme Court of the United States

---

October Term, 1977

No. 77-76

---

FRED H. SMITH and DOROTHY A. SMITH,  
*Petitioners,*

vs.

VILLAGE OF LAGRANGE,  
A Municipal Corporation Under the Laws of Ohio,  
*Respondent.*

---

ON PETITION FOR WRIT OF CERTIORARI TO THE  
COURT OF APPEALS, ASHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

---

---

## BRIEF OF RESPONDENT IN OPPOSITION

---

ROBERT J. CORTS

517 Broad Street  
Elyria, Ohio 44035

*Counsel for Respondent*

---

## TABLE OF CONTENTS

OPINIONS AND JUDGMENT ENTRIES BELOW ....	1
COUNTERSTATEMENT OF JURISDICTION .....	2
COUNTERSTATEMENT OF THE CASE .....	2
REASONS WHY THE WRIT SHOULD BE DENIED	5
I. The Decisions of the Supreme Court of Ohio and the Court of Appeals for the Fifth District of Ohio Do Not Conflict With the Due Process Clause of the Constitution of the United States As Enunciated in the Decisions of This Court ....	5
II. The Evidence in the Case Was Sufficient to Enable the Trial Court to Render a Decision on the Motion to Dismiss, and the Record of the Case Provided Adequate Grounds on Which the Court of Appeals Could Reach a Decision Sustaining the Decision of the Lower Court .....	7
CONCLUSION .....	9

## TABLE OF AUTHORITIES

### Cases

<i>Emery v. Toledo</i> , 121 Ohio St. 257 (1929) .....	5
<i>Great Falls Manufacturing Company v. Garland, At- torney General, et al.</i> , 124 U.S. 581 (1888) .....	6
<i>State of Oklahoma v. United States Civil Service</i> , 330 U.S. 127 (1976) .....	7

### Rules

Federal Rules of Civil Procedure, Rule 12 (b) .....	8
Ohio Rules of Civil Procedure, Rule 12 (B) .....	8

**Other**

*Some Problems Concerning Motions Under Federal Rule 12 (b)* by Claude H. Brown, Visiting Professor of Law, University of Arizona College of Law, 3 F.R.D. 146, 150 ..... 8

**Supreme Court of the United States**

**October Term, 1977**

**No. 77-76**

**FRED H. SMITH and DOROTHY A. SMITH,**  
*Petitioners,*

**vs.**

**VILLAGE OF LAGRANGE,**  
**A Municipal Corporation Under the Laws of Ohio,**  
*Respondent.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE  
COURT OF APPEALS, ASHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT**

**BRIEF OF RESPONDENT IN OPPOSITION**

**OPINIONS AND JUDGMENT ENTRIES BELOW**

The unreported opinion of the Supreme Court of Ohio is set forth in Appendix, page A10 of the Petition.

The unreported opinion of the Court of Appeals of the Fifth Appellate District of the State of Ohio is set forth in Appendix, page A8 of the Petition.

The unreported opinion of the Ashland County Court of Common Pleas is set forth in Appendix, page A1 of the Petition.

The judgment entry of the Ashland County Court of Appeals is set forth in Appendix, page A6, of the Court of Appeals for the Fifth Appellate District of the State of Ohio at Appendix, page A9, and of the Supreme Court of the State of Ohio at Appendix, page A10 of the Petition.

### **COUNTERSTATEMENT OF JURISDICTION**

The Court lacks the jurisdiction as explained hereafter to grant this writ of certiorari under 28 U.S.C. para. 1257 (3).

### **COUNTERSTATEMENT OF THE CASE**

This lawsuit constitutes a collateral attack on the judgment of the Court of Common Pleas of Lorain County, Ohio rendered in Case No. 59190, on April 24, 1956.

The Petitioners herein were parties to that action, one to appropriate property to provide a source of water supply to the residents of the Village of LaGrange, Ohio pursuant to the provisions of statutes of the State of Ohio authorizing such action, being owners of a 40% interest in the premises, as were others, the co-owners of the property with the Petitioners.

The Petitioners herein were represented by able and competent counsel in that action, their counsel being presently a Judge of the Lorain County Court of Common Pleas.

No claims of defect in legislation or any other procedural matters were raised in that case. The case was tried before a jury, with Petitioners being present and

represented by counsel, solely on the question of the value of the property appropriated.

After the verdict of the jury, appeals were prosecuted, first by the Petitioners herein, and then by the Village, to the Court of Appeals for the Ninth Judicial District of Ohio. While the appeals were pending, the Village, the Petitioners herein, and all other parties resolved their differences and entered a written and signed agreement to this effect, which, after the dismissal of the appeals, was made a part of the judgment entry in the appropriation case. The agreement was signed by both Petitioners.

The matters alleged in paragraphs 1 to 14 of the Complaint in this case were all matters litigated in the appropriation case and within the jurisdiction of the Ohio Courts.

Subsequently, the Petitioners herein filed several lawsuits against the Village of LaGrange, Ohio on matters growing out of the appropriation case. One of these cases was brought on the allegation that the Village was permitting the LaGrange Hunting and Fishing Club to use the appropriated property for hunting and fishing purposes and thus not using the property for the purpose for which it was appropriated. The Lorain County Court of Common Pleas rendered judgment in favor of the Village in that case, and on appeal by Petitioners herein to the Court of Appeals of the Ninth Judicial District of the State of Ohio, that court affirmed the decision of the lower court. The Supreme Court of the State of Ohio overruled a motion to certify that case made by the Petitioners herein.

The matter litigated in that case is the same as the allegation made in paragraph 15 in the Complaint in the instant case.



The instant case was filed in October, 1975, 19½ years after the judgment in the appropriation case which it collaterally attacks. To this Complaint the Village filed a motion to dismiss under authority of Rule 12 (B) 1 and 2 and 6 of the Ohio Rules of Civil Procedure.

On motion of the Complainant, Petitioners herein, venue was changed to the Common Pleas Court for Ashland County, Ohio.

A hearing was held on the motion to dismiss before a judge of the Court of Common Pleas for Ashland County. Evidence was presented in the form of testimony by Fred H. Smith, one of the Petitioners herein, in which he gave general testimony, a check given by the Village made payable to the Lorain County Clerk of Courts, as is provided for by Ohio law for payment of the property appropriated, a contract which he signed agreeing to the judgment entry in the appropriation case, and a copy of the judgment entry. These were made part of the evidence. The Village of LaGrange, Ohio presented into evidence the official court transcript of the appropriation case, and the case wherein Petitioners allege a use by the LaGrange Hunting and Fishing Club, in the Court of Common Pleas, the Court of Appeals, and the Supreme Court of Ohio. The Village of LaGrange, Ohio also introduced all the original pleadings, journal entries, and other papers contained within the court file relating to these cases.

The Respondent takes issue with the statement of the Petitioners found on page 10 of the Petition in the Statement of the Case wherein they state that the Ashland County Court of Common Pleas "heard arguments in support of and against defendant Village's motion and rendered an opinion" insofar as that statement implies that no evidence was received by the Court in this matter and upon the motion to dismiss.

In appeal by these Petitioners to the Court of Appeals of the Fifth District of the State of Ohio, that Court overruled the assignment of errors made by the Petitioners herein, and affirmed the judgment of the Ashland County Court of Common Pleas.

Petitioners then filed this Petition for a Writ of Certiorari in this Court.

### **REASONS WHY THE WRIT SHOULD BE DENIED**

#### **I. The Decisions of the Supreme Court of Ohio and the Court of Appeals for the Fifth District of Ohio Do Not Conflict With the Due Process Clause of the Constitution of the United States As Enunciated in the Decisions of This Court.**

This case was decided by the Courts of Ohio principally upon the holding of the Ohio Supreme Court in the case of *Emery v. Toledo*, 121 Ohio St. 257 (1929), in which that Court decreed that in an action by a public agency appropriating private property that the only question before the Court is that of the value of the property appropriated. It further held that an owner whose property is being appropriated by a municipality may, at any time before the issue of value is determined, invoke the aid of a Court of equity to determine whether the use is a public one, or whether the municipality in its legislative proceedings has complied with reasonable strictness with the statutes whereby the power to appropriate is conferred, or whether the municipality is acting in good faith or abusing its power. However, by the property owner's participation in the appropriation proceedings in which only value is determined without questioning the validity of the legislation of city council, and by his submis-

sion to the determination of the jury the amount of the damages suffered by the property being taken, he is estopped from questioning the validity of that legislation after a verdict is rendered.

This Court in the case of *Great Falls Manufacturing Company v. Garland, Attorney General, et al.*, 124 U.S. 581 (1888) enunciated the same principle.

In that case the United States had appropriated river land and water to provide a water supply for the City of Washington, D. C. In the enabling legislation, the Congress provided that the Secretary of War should have the land and water rights valued by appraisers, prepare a survey and map, and that the Attorney General should give notice by publication of the intention to appropriate. Apparently this was not done properly. The property owners brought an action to recover damages for the taking of the land and water in the Court of Claims but did not assert a claim of lack of jurisdiction by reason of this fact. The Court stated at page 598:

"In reference to the allegation that the survey and map made by the secretary were not sufficiently accurate, and that the notice published by the attorney general was materially defective, it may be further said that all such objections were waived by the company, when, proceeding under the act of 1882, it invoked the jurisdiction of the court of claims to give judgment against the United States for such compensation as it was entitled to receive for its land and water rights. Even if the secretary's survey and map, and the publication of the attorney general's notice, did not, in strict law, justify the former in taking possession of the land and water-rights in question, it was competent for the company to waive the tort, and proceed against the United States on an implied

contract it appearing, as it does here, that the government recognizes and retains the possession taken in its behalf for the public purposes indicated in the act under which its officers have proceeded."

Similarly, in the case of *State of Oklahoma v. United States Civil Service*, 330 U.S. 127 (1976) this Court held:

"Where no objection was made to state's capacity to bring action to review order of U. S. Civil Service Commission directing suspension from office of a member of State Highway Commission or in lieu thereof that certain federal funds be withheld from the State on its refusal to order such suspension under the Hatch Act until filing of memorandum for the commission on State's petition for certiorari, objection would be out of time since failure to object in trial court to a party's capacity is a waiver of that defect."

And so, on authority of these cases, Petitioners' failure to assert the matters which form the basis of the instant case in the appropriation action estops them from asserting those matters in this collateral attack on the judgment.

## **II. The Evidence in the Case Was Sufficient to Enable the Trial Court to Render a Decision on the Motion to Dismiss, and the Record of the Case Provided Adequate Grounds on Which the Court of Appeals Could Reach a Decision Sustaining the Decision of the Lower Court.**

The Court of Common Pleas for Ashland County, Ohio held a hearing at which the Petitioners were present and in which they offered testimony and exhibits. Admitted into evidence was the contract signed by these Petitioners and all other parties to the appropriation case agreeing to the journal entry which was signed by the judge as



the judgment entry in that case. Also introduced in this case was a transcript of the proceedings in the appropriation case including appeals to the Ninth District Court of Appeals, and the Ohio Supreme Court in which the action of the lower courts was sustained. A complete record of another case, which began in the Lorain County Court of Common Pleas, was appealed to the Ninth District Court of Appeals, and to which the Ohio Supreme Court overruled a motion to certify, in which the Petitioners alleged that the property was being used for a purpose different from that for which it was appropriated, as is alleged in paragraph 15 of the instant case, was also introduced in evidence in this case before the Judge of the Court of Common Pleas. The check which was issued by the Village of LaGrange to the Clerk of Courts, as is provided for by Ohio law, in payment for the property appropriated was a matter of evidence in the Court below.

All of these things in evidence before the Ashland County Common Pleas Court constituted ample authority for the Court's decision that the matters in the instant lawsuit had all been litigated in other lawsuits between these parties, or could have been, and were therefore *res adjudicata* in the instant case and without the jurisdiction of that court.

Rule 12 (B) of the Ohio Rules of Civil Procedure is identical to Rule 12 (b) of the Federal Rules of Civil Procedure as it relates to the jurisdictional question raised.

In 3 F.R.D. 146, at page 150, there appears an article *Some Problems concerning Motions under Federal Rule 12 (b)* by Claude H. Brown, Visiting Professor of Law, University of Arizona College of Law in which the following statement is made:

"It is obvious that the movement is not confined to the contents of the pleading alleging the claim if the motion raises issues under subdivisions 1 to 5 of Rule 12 (b)—questions of jurisdiction, venue, and process."

And so it is contended that the evidence adduced in this case in the trial court was properly admitted, and that it is sufficient to sustain the holding in the case.

### CONCLUSION

The Courts of the State of Ohio correctly determined that no substantial constitutional issue exists in the instant case, and therefore the Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT J. CORTS  
517 Broad Street  
Elyria, Ohio 44035  
*Counsel for Respondent*